

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company	)	
	)	00-0259
Petition for expedited approval of	)	
implementation of a market-based	)	
alternative tariff, to become effective on	)	
or before May 1, 2000, pursuant to	)	
Article IX and Section 16-112 of the	)	
Public Utilities Act	)	
	)	(cons.)
Central Illinois Public Service Company	)	
Union Electric Company	)	
	)	00-0395
Petition for approval of revisions to	)	
market value tariff, Rider MV	)	
	)	
Illinois Power Company	)	
	)	00-0461
Proposed new rider MVI and	)	
revisions to rider TC.	)	

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**COMMONWEALTH EDISON COMPANY’S AND ILLINOIS POWER COMPANY’S  
VERIFIED JOINT REPLY TO AES NEWENERGY, INC.’S OPPOSITION TO  
MOTION TO STRIKE<sup>1</sup>**

Commonwealth Edison Company’s (“ComEd”) and Illinois Power Company’s (“IP”) Motion to Strike Portions of AES NewEnergy, Inc.’s (“NewEnergy”) Testimony on Reopening is based on one simple fact: NewEnergy exceeded both the scope of its Motion to Hold Additional Hearings (“NewEnergy Motion”) and the parties’ agreement at the January 25, 2001 status hearing. This simple fact is well documented in the record. This was and remains a simple motion. The utilities, like other parties, are entitled to fair and consistent application of

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<sup>1</sup> The Ameren Companies (“Ameren”) supported the Motion to Strike. Ameren has reviewed this response and fully supports it.

procedural rules, including enforcement of an established schedule and notice of issues to be heard. NewEnergy's attempts to obscure these issues should be rejected.

1. There is no basis for NewEnergy's claims that the utilities filed "deficient" tariffs or that they are protecting a "deficient" record. *See* NewEnergy Opposition at 2-3. The only "evidence" NewEnergy cites to support this proposition is the Hearing Examiner's Proposed Order ("HEPO"), which does not support its claims. The HEPO states:

In making a determination on this [optionality] issue, the Commission first observes that the reasons for considering an optionality adjustment were well articulated by NewEnergy and Staff witnesses. *However, in the Commission's view, the record does not support a finding requiring utilities to implement an optionality adjustment at this time.* While there is evidence suggesting the utilities' methodologies do not fully reflect the costs associated with serving uncertain load, the Commission agrees with contentions by Staff and several other parties that the record simply does not contain a viable approach for use in quantifying an optionality adjustment. The Commission also notes that there is no indication in the record that the magnitude of such costs is significant in relation to market values.

HEPO at 117 (emphasis added). The HEPO goes on to point out that NewEnergy's proposed optionality adjustment was essentially the same as its proposed "off-peak load shaping" adjustment, and that ComEd had contended that its methodology fully accounted for the characteristics of power and energy as applied to retail load. The HEPO then concludes:

. . . the reasons for rejecting an optionality adjustment articulated immediately above also appear to be applicable to the off-peak load shaping adjustment. For those reasons, the Commission finds that *the need for an additional off-peak load shaping adjustment has not been adequately supported*, and the record does not contain an acceptable method for implementing such an adjustment even if one were to assume such an adjustment were necessary.

*Id.* at 118 (emphasis added). Thus, the HEPO found that the evidence supported neither a finding that an adjustment should be required, nor any mechanism for making such an

adjustment. Rather, the HEPO approves use of the market value index methodologies (*id.* at 126), clearly not finding them to be deficient.

2. Contrary to NewEnergy's accusations, the utilities do not dispute that NewEnergy is entitled to respond to the issues that have been raised by the utilities themselves. *See* NewEnergy Opposition at 3. That is the purpose of *rebuttal* testimony. However, what NewEnergy filed was *direct* testimony, and it was clearly labeled as such. The portions of this direct testimony that are not responsive to the utility testimony are improper rebuttal testimony and should be stricken.

3. Contrary to NewEnergy's statements, the utilities are *not* relying on their own assertions concerning the issues to be discussed in these additional hearings—we are relying on *NewEnergy's* representations and those agreed to by the parties at the January 25, 2001 status hearing. Significantly, NewEnergy is the only party to this proceeding that is attempting to introduce evidence on issues that go beyond those discussed in the motions to reopen the record and the January 25, 2001 status hearing. The record on both the motion and the status are clear. NewEnergy cannot dispute the simple fact that it requested “hearings to address two (2) limited issues.” NewEnergy Motion at 1; *see also* Reply of NewEnergy Midwest, L.L.C. in Support of Its Motion to Hold Additional Hearings (“NewEnergy Reply”) at 1. NewEnergy specifically requested in its prayer for relief that the Commission “(1) Hold additional hearings to take evidence regarding the prices at which Ameren, Edison, and Illinois Power sold off-peak power during the past twelve (12) months” and “(2) Hold additional hearings to take evidence regarding the optionality adjustments utilized by the utilities in the wholesale marketplace today.” NewEnergy Motion at 15; *see also* NewEnergy Reply at 13. This was the specific relief that the Commission granted when it reopened the record. Contrary to NewEnergy's representation, this

relief was not a “component” (NewEnergy Opposition at 6) of the relief it sought, it was NewEnergy’s entire prayer for relief. NewEnergy did not request—and therefore the Commission did not grant—a reopening to relitigate the *need* for an off-peak or an optionality adjustment or to consider NewEnergy’s *own* new proposals. None of the utilities proffered testimony concerning the need for these adjustments or NewEnergy’s specific proposals. Therefore, there was nothing for NewEnergy to *respond* to. *See id.* at 9.

5. *Second*, ComEd and IP are particularly troubled by NewEnergy’s statement that only “scheduling” was discussed at the January 25, 2001 status. *See* NewEnergy Opposition at 5. This statement is without merit. As NewEnergy is well aware, at the direction of the Hearing Examiner, the parties engaged in a lengthy off-the-record discussion concerning the scope of the issues in this proceeding. Once the parties were back on the record, this off-the-record discussion was summarized for the Hearing Examiner, as is common practice. Counsel for ComEd began her summary of this discussion by stating that “[w]e’ve agreed that there are three evidentiary issues on reopening.” Transcript of January 25, 2001 Status Hearing (“Transcript”) at 12. No party objected to this statement.

NewEnergy takes ComEd’s attorney’s statement that there was “some dispute” on the scope of the hearings completely out of context. As NewEnergy’s attorney is well aware, when ComEd’s attorney stated that “[t]here was some dispute on the scope of the Commission’s ruling, and the parties have agreed regardless of what their views are that they will have a March 2 conference call to discuss IIEC’s composite market index proposal. . . ” (*id.* at 14), she was referring to the lengthy off-the-record discussion as to whether there was a *fourth* issue to be addressed in this proceeding. This fourth issue was IIEC’s composite market index proposal.

*See also id.* at 20. This was also the disagreement referred to by counsel for IIEC. *See also id.* NewEnergy knows that this did not refer to NewEnergy's two issues.

In addition, contrary to NewEnergy's statements, there was a lengthy discussion concerning waiver of rights to participate in the off-peak issue. All parties—including NewEnergy—agreed that only Staff, the Attorney General and the utilities would participate and file testimony relating to this issue. *See id.* at 12; *see also id.* at 16.

NewEnergy correctly notes that it made further comments on the schedule. *See* NewEnergy Opposition at 5. However, as a reading of the transcript shows, it was not to address ComEd's "inappropriate" action. Rather, NewEnergy's counsel suggested that NewEnergy might include testimony "clarifying the way in which that data would be used, whatever the data is, how that would be used within the data hierarchy." Transcript at 18. At that time, ComEd's counsel again clarified for the record that such an action would be inappropriate if it expanded the issues for review. *See id.* ComEd's counsel further stated "[I]f you say something narrow about the data hierarchy or if there is such data this is how you prefer to see it, I think that's probably minor enough that we don't have an objection." *Id.* NewEnergy's forty-five pages of direct testimony clearly does not represent a "narrow" expansion of the issues. In short, the January 25, 2001 transcript speaks for itself. NewEnergy's claim that ComEd is "attempt[ing] to bootstrap its reading of a schedule into the record" is a clear misrepresentation of the facts to the Hearing Examiner and this Commission.

6. NewEnergy further attempts to mislead the Hearing Examiner with its representation that the utilities have chosen not to present testimony on the off-peak issue and therefore NewEnergy's testimony is necessary to fill a void. *See* NewEnergy Opposition at 7-8. As was first suggested in NewEnergy's Motion and agreed to by the parties at the January 25,

2001 status hearing, this issue has been dealt with solely among Staff, the Attorney General, and the utilities. Indeed, at the January 25, 2001 status hearing, NewEnergy's counsel specifically recognized this. In response to the Hearing Examiner's question regarding the schedule concerning this issue, counsel for ComEd and NewEnergy engaged in the following discussion:

MS. READ: Well, other parties don't get to see that testimony and will not be participating in the hearings on that issue, so I don't think they were concerned about the dates. We could certainly let the Hearing Examiner know what dates have been agreed to.

MR. TOWNSEND: . . . Whatever dates the Staff, the Attorney General and the relevant utilities are able to put together is fine by us.

Transcript at 16. ComEd and IP have responded to all of the Staff's and Attorney General's data requests on reopening, as they did to the previous data requests served by these parties. Staff also chose to file confidential testimony on this issue. As agreed, this confidential testimony was only circulated to the Attorney General and the utilities. ComEd will file responsive testimony on these issues on February 22, 2001. Again, as agreed, such confidential responsive testimony will only be given to Staff and the Attorney General. Neither ComEd nor IP has made any effort to hide this information from the Commission as NewEnergy suggests. *See NewEnergy Opposition at 7.* Therefore, there is no void for NewEnergy to fill.

7. Moreover, ComEd's decision to accept a modification as proposed in the HEPO—and NewEnergy's comments on the appropriateness of that decision—are not at issue in this proceeding. *See id.* at 10. Comments concerning the HEPO are the subject of Briefs and Reply Briefs on Exceptions and NewEnergy had ample opportunity to make its feelings known there. The issue on reopening concerning the electronic exchanges, as clearly stated in IIEC's Motion to Reopen and at the January 25, 2001 status hearing, is the effect of the removal of the Into ComEd screen on Bloomberg PowerMatch and the use of electronic exchanges generally.

ComEd did not move to strike NewEnergy's testimony that responds to these issues. *See* Joint Testimony of Philip R. O'Connor and Tom Bramscreiber at 3-8.

8. Nor are Frank Huntowski's statements from the *initial phase* of this proceeding regarding credit ratings at issue in this reopening. *See id.* at 10. The Joint Direct Testimony of Philip R. O'Connor and Tom Bramscreiber responds to a question on whether they agree with "Mr. Huntowski, who testified in the initial phase on behalf of Edison, [who] has contended that credit ratings effect the price at which buyers are able to acquire power and energy." Joint Direct Testimony of Philip R. O'Connor and Tom Bramscreiber at 12. If NewEnergy wanted to rebut Mr. Huntowski's testimony, it had ample opportunity to do so in its unauthorized surrebuttal testimony and during cross examination on October 4, 2000. Clearly ComEd's testimony on reopening did not open the door for rebuttal on Mr. Huntowski's former statements.

9. NewEnergy's Motion speaks for itself. It was the "limited" relief sought by NewEnergy in its motion that was granted by the Commission. Its testimony is not "appropriate, relevant or important" as NewEnergy suggests. Accordingly, NewEnergy's attempt to exceed the scope of this relief should be rejected.

WHEREFORE, ComEd and IP respectfully requests that the Hearing Examiner grant this motion to strike the portions of the testimony filed on behalf of NewEnergy as identified in its motion.

Respectfully Submitted,

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Dated: February 22, 2001



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**AFFIDAVIT IN VERIFICATION**

Courtney A. Rosen, being duly sworn on oath deposes and states as follows:

1. That she is one of the attorneys for Commonwealth Edison Company.
2. That she is familiar with the statements contained in the foregoing

Commonwealth Edison Company's and Illinois Power Company's Verified Joint Reply to AES  
NewEnergy, Inc.'s Opposition to Motion to Strike.

3. That she was present at the January 25, 2001 status hearing referenced  
therein.
4. That the statements contained in said Reply are true and correct to the best  
of her information and belief.

FURTHER AFFIANT SAYETH NOT.

\_\_\_\_\_  
Courtney A. Rosen

STATE OF ILLINOIS       :  
                                  :  
                                  :       SS  
COOK COUNTY            :

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 22<sup>nd</sup> day of  
February, 2001.

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**NOTICE OF FILING**

TO: SERVICE LIST

PLEASE TAKE NOTICE that on this date we will electronically file with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62706 Commonwealth Edison Company's and Illinois Power Company's Verified Joint Reply to AES NewEnergy, Inc.'s Opposition to Motion to Strike in the above captioned matter.

DATED this 22<sup>th</sup> day of February, 2001.

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**CERTIFICATE OF SERVICE**

I, Courtney A. Rosen, an attorney, certify that I caused copies of the attached Commonwealth Edison Company's and Illinois Power Company's Verified Joint Reply to AES NewEnergy, Inc.'s Opposition to Motion to Strike to be served on each of the interested parties by email and Federal Express, this 22<sup>th</sup> day of February, 2001.

\_\_\_\_\_  
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